

PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Name Lopez Jesus
 (Last) (First) (Initial)

Prisoner Number D-37180

Institutional Address Correctional Training Facility
P.O. Box 689, Soledad, CA 93960-0689

**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA**

Jesus Lopez

(Enter the full name of plaintiff in this action.)

vs.

Ben Curry, Warden (A) et al.

(Enter the full name of respondent(s) or jailor in this action)

Case No. 08 2071
 (To be provided by the clerk of court)

**PETITION FOR A WRIT
 OF HABEAS CORPUS**

EXHIBIT BOUND AND LODGED
 SEPARATELY.

Read Comments Carefully Before Filling In

When and Where to File

You should file in the Northern District if you were convicted and sentenced in one of these counties: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, Santa Clara, Santa Cruz, San Francisco, San Mateo and Sonoma. You should also file in this district if you are challenging the manner in which your sentence is being executed, such as loss of good time credits, and you are confined in one of these counties. Habeas L.R. 2254-3(a).

If you are challenging your conviction or sentence and you were not convicted and sentenced in one of the above-named fifteen counties, your petition will likely be transferred to the United States District Court for the district in which the state court that convicted and sentenced you is located. If you are challenging the execution of your sentence and you are not in prison in one of these counties, your petition will likely be transferred to the district court for the district that includes the institution where you are confined. Habeas L.R. 2254-3(b).

FILED

APR 21 2008

RICHARD W. WIEKING
 CLERK, U.S. DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

WHA

(PR)

008-2071-WHA

1 petition? Yes _____ No _____

2 (c) Was there an opinion? Yes _____ No _____

3 (d) Did you seek permission to file a late appeal under Rule 31(a)?

4 Yes _____ No _____

5 If you did, give the name of the court and the result:

6 _____
7 _____

8 9. Other than appeals, have you previously filed any petitions, applications or motions with respect to
9 this conviction in any court, state or federal? Yes X No _____

10 [Note: If you previously filed a petition for a writ of habeas corpus in federal court that
11 challenged the same conviction you are challenging now and if that petition was denied or dismissed
12 with prejudice, you must first file a motion in the United States Court of Appeals for the Ninth Circuit
13 for an order authorizing the district court to consider this petition. You may not file a second or
14 subsequent federal habeas petition without first obtaining such an order from the Ninth Circuit. 28
15 U.S.C. §§ 2244(b).]

16 (a) If you sought relief in any proceeding other than an appeal, answer the following
17 questions for each proceeding. Attach extra paper if you need more space.

18 I. Name of Court: California Superior Court

19 Type of Proceeding: Habeas Corpus

20 Grounds raised (Be brief but specific):

21 a. GOVERNOR violated due process

22 b. _____

23 c. _____

24 d. _____

25 Result: Denied No. 5495 Date of Result: 10/24/2007
see exhibit V section B

26 II. Name of Court: California Courts of Appeal

27 Type of Proceeding: Habeas Corpus

28 Grounds raised (Be brief but specific):

Same As Above

a. _____
b. _____
c. _____
d. _____

Result: Denied No. A119885 Date of Result: 12/17/2007
~~see exhibit 1~~

III. Name of Court: California Supreme Court

Type of Proceeding: Petition for review

Grounds raised (Be brief but specific):

a. Governor violated due process.

b. _____
c. _____
d. _____

Result: Denied No. S159508 Date of Result: 3/19/2008

IV. Name of Court: _____

Type of Proceeding: _____

Grounds raised (Be brief but specific):

a. _____
b. _____
c. _____
d. _____

Result: _____ Date of Result: _____

(b) Is any petition, appeal or other post-conviction proceeding now pending in any court?

Yes _____ No ^X _____

Name and location of court: _____

B. GROUNDS FOR RELIEF

State briefly every reason that you believe you are being confined unlawfully. Give facts to support each claim. For example, what legal right or privilege were you denied? What happened? Who made the error? Avoid legal arguments with numerous case citations. Attach extra paper if you

1 need more space. Answer the same questions for each claim.

2 [Note: You must present ALL your claims in your first federal habeas petition. Subsequent
3 petitions may be dismissed without review on the merits. 28 U.S.C. §§ 2244(b); McCleskey v. Zant,
4 499 U.S. 467, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991).]

5 Claim One: See proceedings pages.

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7 Supporting Facts: see proceeding pages.

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11 Claim Two:

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13 Supporting Facts:

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17 Claim Three:

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19 Supporting Facts:

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22
23 If any of these grounds was not previously presented to any other court, state briefly which
24 grounds were not presented and why:

25 Ground was presented to highest State Court
26 and was denied on the merits.

INTRODUCTION

Petitioner, Jesus Lopez, a prisoner at Correctional Training Facility, State Prison, is filing this pro se petition for writ of habeas corpus. After 21 years of incarceration on petitioner's 17-to-life sentence during which he has exhibited exemplary behavior (fact found by both the Board of Parole Hearings (Board) and the Governor), the Board found he no longer posed a danger to public safety and Granted his parole.

After careful review of petitioner's record during his latest parole consideration hearing held August 10, 2006, the Board having granted parole, determined petitioner's term to be set at 164 months, (13 years 8 months) giving him a release date of April 28, 1999, therefore the Board his release would be due upon their decision being final (120 days Penal Code 3041 et seq.).

The Board's decision became final on December 8, 2006, instead of petitioner's release, petitioner was held pending a belated review by the Governor, who reversed the Boards decision on December 21, 2006 and denied petitioner his release, based solely on the nature and circumstances of the offense petitioner committed over 23 years ago. The reason given by the Governor is not evidence to overturn a finding by the Board that petitioner does not pose a current risk to public safety. Therefore petition should be granted.

BACKGROUND

On October 26, 1983, petitioner retrieved a gun from his car and ultimately shot Robert Barajas and wounded Guadalupe Olmedo. While the specific facts can be disputed, nothing will change the end result of petitioner's actions 23 years ago. The question is, after 21 years of continued incarceration and overwhelming evidence of rehabilitation, and a finding by the Board petitioner does not pose a risk to public safety when parole, allowed to be overturned by the Governor simply because the Governor does not like the crime? Again, nothing in petitioner's record supports any other conclusion then petitioner no longer poses a risk to public safety.

The Board reviewed the offense, length of time served, all information received from the public, and concluded petitioner was suitable for parole and "would not pose an unreasonable risk of danger to society or a threat to public safety" if you're released from prison. See (Exhibit II pg 55) (Exhibits Bound and Submitted Separately).

The Board further found: "with respect to the factors of suitability we noted that you had no juvenile record of assaulting others, that you had a stable social history exhibited by reasonable stable relationships with others. You came from an intact family, large family in Mexico. But while in prison, you've enhanced your ability to function within the law through participation in education programs and the panel noted that although you had a high school diploma from Mexico you took advantage of the opportunity here and achieved a GED while incarcerated. That you've participated in self-help programs. The panel noted and to your credit that you've not only done one program with respect to the alcohol issues, that you've actually done three in a long sustained manner. And that included the 12-step program and multiple other AA programs occurring on different nights of the week. So far as your vocational programs, you did get the vocational certificate in auto mechanics and you also have had institutional job assignments that will provide you opportunities for marketable skills upon your parole. And that includes the time you spent as an electrician, the time that you were in the carpentry and then also the fact that you're now working as a porter with one of the chaplains. The panel noted that the offense could have been committed as a result of significant stress in your life and the indication was that there was a life threatening knife attack that you had previously suffered, that you lacked a significant criminal history of violent crime, (Id. 55-57).

PAROLE PLANS

The Board found: "You've got realistic parole plans. They include a job offer and family support. We know that the family ranch in Mexico is waiting

for you. You have other marketable skills if that doesn't work out or at some point the ranch is no longer to your liking. We also noted that you've got substantial support by virtue of letters. We also noted and reviewed the prior transcript and volumes of letters that were submitted for the hearing of June 10, 2005." (Id. 57).

INSTITUTIONAL BEHAVIOR

The Board found: "That you've maintained positive institutional behavior, which indicates a significant improvement in self control, and to your credit you have only one 115. This was in 1988 and it was for the offense of not wearing earphones with your radio. Certainly it doesn't come up on the level of violence to any degree at all. That you've shown signs of remorse, that you indicate you understand the nature and magnitude of the offense. You've accepted the responsibility for your criminal behavior and you've demonstrated a desire to change toward good citizenship." (Id. 57-58).

TERM SETTING

The Board set petitioner's term as follows: "So far as the base term of your confinement, the baseline offense of which you've been convicted is murder in the second degree with the use of a weapon and that's Penal Code section 187 and 12022.5. And the offense occurred on October 26, 1983. The term derived from the matrix located in Title 15 is at 2403(c), it's second degree murder where the offense was committed on or after November 8, 1978. And we find that category III-B is appropriate in that there appeared to be no prior relationship with the victim and death was almost immediate. The panel is assessing 228 months for the base offense and we note that this is the middle term. So far as the total term calculation, again we indicated that the base term is 228 months. The adjustment for the use of the weapon was to take a 12-month period, which is one-half of the 24 months that's designated, giving us a total of 240 months. Post-conviction credits were granted starting from the date the life term started which was August 28, 1986 through today's date August 10, 2006. We

deducted four months for the year of 1988, that was the year you received the 115, giving you total credits of 76 months. That results in a total period of confinement of 164 months so doing the math you've done the time." (Id. 60-61).

The Board noted for the record: "With respect to the parole plans, the panel noted and considered a recent Appellate Court decision In Re Andrade, A-N-D-R-A-D-E, where parole plans are no longer required in California when you have an active INS hold. So I don't want anyone to think that the panel did not consider that in making this decision." (Id. 61).

GOVERNOR'S REVERSAL DECISION

The Governor's decision, see (Exhibit IV) agreed with the Board findings regarding suitability factors. The Governor noted that petitioner made no parole plans in San Francisco County, which has been found to be illegal for inmates who have an active INS hold In re Andrade 141 Cal.App. 4th 807.

The Governor noted: "In finding Mr. Lopez suitable for parole, the 2006 Board said "the offense could have been committed as a result of significant stress in your life and the indication was that there was a life threatening knife attack that you had previously suffered..." But even if Mr. Lopez was under stress when he perpetrated the life offense, I believe that factor, by itself, is presently insufficient to mitigate the nature and circumstances of the murder he committed.

At age 46 now, after being incarcerated for more than 21 years, Mr. Lopez says he accepts responsibility and is remorseful for his actions. But given the current record before me, and after carefully considering the very same factors the Board must consider, I find that the gravity of the murder perpetrated by Mr. Lopez presently outweighs the positive factors. Accordingly, because I believe his release would pose an unreasonable risk of danger to society at this time, I reverse the Board's 2006 decision to grant parole to Mr. Lopez."

Support letters were written to the Governor from members of the Community where petitioner was to parole (Durango, Mexico) (see Ex III Juan Esteban, a

member of a local AA group, who will assist Petitioner in joining the group. And a letter from Pedro Avila Nevarez, Federal Delegate for the State of Durango, Mexico, who reviewed Petitioner's Offenses, Rehabilitation, age, etc., and found Petitioner suitable to live in his community and ask the Governor of California to parole Petitioner. The Governor does not mention if he even considered these letters from where Petitioner would actual parole.

With the overwhelming evidence to the contrary, the Governor's reason for reversal is not supported by "some evidence" that Petitioner poses an unreasonable risk to public safety.

PETITIONER'S CONTENTION

GROUND ONE:

Were Petitioner's State and Federal Due Process right to parole violated by the CALIFORNIA GOVERNOR'S 12/21/2006 reversal of the Board's grant of parole when the GOVERNOR'S decision contains "no evidence" Petitioner "currently" poses an unreasonable risk to public safety if released from prison?

The parole board found Petitioner suitable and granted parole during a hearing held 08/10/2006 see Exhibit "II" (Exhibits submitted and lodged separately).

The Governor reversed the parole boards decision, not because Petitioner failed to meet any suitability factor or meet any of the unsuitability factors, the Governor's only reason to reverse Petitioner's grant of parole was "the offense could have been committed as a result of significant stress in your life and the indication was that there was a life threatening knife attack that you had preciously suffered..." "But even if Mr. Lopez was under stress when he

perpetrated the life offense, I believe that factor, by itself, is presently insufficient to mitigate the nature and circumstances of the murder he committed."

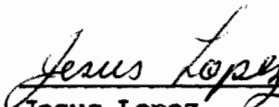
The test is not whether some evidence supports the reasons cited by the Governor for reversing parole, but whether some evidence indicates a parolee's release unreasonably endangers public safety see Hayward v. Marshall, (2008) 512 F.3d 536, 543; In re SINGLER (2008) ____Cal.App.4th____, 2008 Cal.App. LEXIS 408.

Petitioner declares, with the above principle in mind, notwithstanding his crimes (factors he can never change), that the Governor's reason used to justify the reversal of parole contained "no evidence" he would pose an unreasonable risk to public safety if released from prison.

CONCLUSION

WHEREFORE: Notwithstanding the fact that the Governor never stated in his decision that he believed Petitioner would be a danger if released from prison, Petitioner respectfully request this Court review his "record" to determine whether there is "some evidence" that he continues to pose an unreasonable risk to public safety if released from prison. When this Court finds "no" such evidence, then Petitioner ask the Court to GRANT his petition, as the Hayward and Singler Court has done, and being past parole date that was set by the Board, order his immediate release on parole.

I, declare under penalty of perjury that the foregoing is true and correct.

 APRIL 15, 08
Jesus Lopez

1 List, by name and citation only, any cases that you think are close factually to yours so that they
2 are an example of the error you believe occurred in your case. Do not discuss the holding or reasoning
3 of these cases:

4 HAYWARD V. MARSHALL 512 F.3d 536 (2008)
5
6

7 Do you have an attorney for this petition?

Yes____ No x

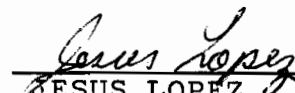
8 If you do, give the name and address of your attorney:
9

10 WHEREFORE, petitioner prays that the Court grant petitioner relief to which s/he may be entitled in
11 this proceeding. I verify under penalty of perjury that the foregoing is true and correct.

12
13 Executed on

15 APRIL 2008

14 Date


JESUS LOPEZ
Signature of Petitioner

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19
20 (Rev. 6/02)

**PROOF OF SERVICE BY MAIL
BY PERSON IN STATE CUSTODY**

(C.C.P. §§ 1013(A), 2015,5)

I, JESUS LOPEZ, declare:

I am over 18 years of age and I am party to this action. I am a resident of CORRECTIONAL TRAINING FACILITY prison, in the County of Monterrey, State of California. My prison address is:

JESUS LOPEZ, CDCR #: D-37180
CORRECTIONAL TRAINING FACILITY
P.O. BOX 689, CELL #: BW-201-LOW
SOLEDAD, CA 93960-0689.

On April 15, 2008, I served the attached:

PETITION FOR WRIT OF HABEAS CORPUS.

on the parties herein by placing true and correct copies thereof, enclosed in a sealed envelope (verified by prison staff), with postage thereon fully paid, in the United States Mail in a deposit box so provided at the above-named institution in which I am presently confined. The envelope was addressed as follows:

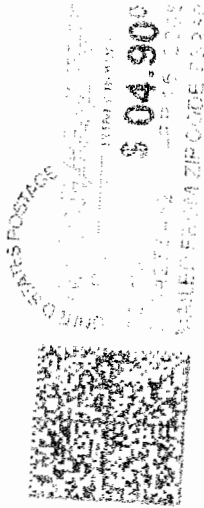
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
450 GOLDEN GATE AVENUE
P.O. BOX 36060
SAN FRANCISCO, CA 94102-9680

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 15, 2008.

Jesus Lopez
JESUS LOPEZ
Declarant

JESUS LOPEZ D37180
CORRECTIONAL TRAINING FACILITY
P.O. BOX 689 BW-201
SOLEDAD, CA. 93960



RECEIVED

APR 17 7/11/08

RICHARD W. WIERING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

U.S. DISTRICT COURT
NORTHERN DISTRICT COURT
450 GOLDEN GATE AVENUE
P.O. BOX 36060
SAN FRANCISCO, CA.
94102-9680

LEGAL MAIL